

UNITED STATES DISTRICT COURT  
WESTERN DISTRICT OF WASHINGTON  
AT TACOMA

JAMES E. DICKERSON,

Plaintiff,

v.

DAVID H. BRUNEAU,

Defendant.

Case No. C06-5418RBL

ORDER DIRECTING PLAINTIFF  
TO SUBMIT AN AMENDED  
COMPLAINT OR SHOW CAUSE  
WHY MATTER SHOULD NOT  
BE SUMMARILY DISMISSED

The Court, having reviewed plaintiff's complaint and the balance of the record contained herein, does hereby find and ORDER.

(1) A complaint is frivolous when it has no arguable basis in law or fact Franklin v. Murphy, 745 F.2d 1221, 1228 (9th Cir. 1984). When a complaint is frivolous, fails to state a claim, or contains a complete defense to the action on its face, the court may dismiss an *in forma pauperis* complaint before service of process under 28 U.S.C. § 1915(d). Noll v. Carlson, 809 F.2d 1446, 575 (9th Cir. 1987) (*citing Franklin v. Murphy*, 745 F.2d 1221, 1228 (9th Cir. 1984)).

(2) Plaintiff's § 1983 complaint appears to call into question the validity of his conviction and/or sentence. In June 1994, the United States Supreme Court held that "[e]ven a prisoner who has fully exhausted available state remedies has no cause of action under § 1983 unless and until the conviction or sentence is reversed, expunged, invalidated, or impugned by the grant of a writ of habeas corpus." Heck v. Humphrey, 114 S.Ct. 2364, 2373 (1994). The court added:

Under our analysis the statute of limitations poses no difficulty while the state challenges are being pursued, since the § 1983 claim has not yet arisen. . . . [A] § 1983 cause of action for damages attributable to an unconstitutional conviction or sentence does not accrue until the conviction or sentence has been invalidated.

Id. at 2374.

1 Plaintiff claims defendant, the Thurston County Prosecutor, is responsible for his damages related  
 2 to his conviction. The court notes that the caption of the complaint names the prosecutor as the sole  
 3 defendant, but the body of the complaint fails to state with sufficient specificity the personal participation  
 4 of the prosecutor. The court assumes the acts of a prosecutor clearly affect the validity of plaintiff's  
 5 conviction and sentence and thus, should be considered first in a petition for writ of habeas corpus.  
 6 Plaintiff has not shown or provided any documentation to the court showing that he has successfully  
 7 presented this issue in a petition for writ of habeas corpus.

8 Plaintiff's complaint is further deficient. In order to state a claim under 42 U.S.C. § 1983, a  
 9 complaint must allege that (1) the conduct complained of was committed by a person acting under color of  
 10 state law and that (2) the conduct deprived a person of a right, privilege, or immunity secured by the  
 11 Constitution or laws of the United States. Parratt v. Taylor, 451 U.S. 527, 535 (1981), *overruled on*  
 12 *other grounds*, Daniels v. Williams, 474 U.S. 327 (1986). Section 1983 is the appropriate avenue to  
 13 remedy an alleged wrong only if both of these elements are present. Haygood v. Younger, 769 F.2d 1350,  
 14 1354 (9th Cir. 1985), *cert. denied*, 478 U.S. 1020 (1986). The defendant named in this caption of this  
 15 cases, Mr. Bruneau is the county prosecutor and would be entitled to prosecutorial immunity. In the body  
 16 of the complaint, Plaintiff states claims against the Peninsula Daily News, based on stories that were  
 17 published in the newspaper. The newspaper is a private party who did not act under color of state law.  
 18 *See Polk County v. Dodson*, 454 U.S. 312, 317-18 (1981).

19 (3) Due to the deficiencies described above, the court will not serve the complaint. Plaintiff shall  
 20 file an amended complaint, curing, if possible, the above noted deficiencies, or show cause why this matter  
 21 should not be dismissed **by no later than September 29, 2006**. If an amended complaint is not timely  
 22 filed or if plaintiff fails to adequately address these issues, the Court will recommend dismissal of this  
 23 action as frivolous pursuant to 28 U.S.C. § 1915, and such dismissal will count as a "strike" under 28  
 24 U.S.C. § 1915(g).

25 (4) The Clerk is directed to send plaintiff a copy of this Order and the General Order  
 26 DATED this 6<sup>th</sup> day of September, 2006.

27 /s/ J. Kelley Arnold  
 28 J. Kelley Arnold  
 United States Magistrate Judge